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No. 1035

In the Supreme Court of the United States

OCTOBER TERM, 1964

UNITED STATES OF AMERICA, PETITIONER

v.

AHTANUM IRRIGATION DISTRICT, ET AL.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The first opinion of the court of appeals is reported at 236 F. 2d 321. The second opinion of the court of appeals is reported at 330 F. 2d 897. The opinion denying rehearing is reported at 338 F. 2d 307.[1]

[1] The opinions are printed as appendices to the petition for certiorari in *Ahtanum Irrigation District* v. *United States*, No. 1026, this Term, upon the granting of which this petition is conditioned. We have accordingly not reprinted the opinions in this petition.

JURISDICTION

The judgment of the court of appeals was entered March 18, 1964, and a timely motion for rehearing was denied on November 2, 1964. On February 2, 1965, Mr. Justice Douglas extended the time within which the United States might file a petition for a writ of certiorari to and including April 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior had the authority to enter into an agreement, on behalf of the Yakima Indians, with white settlers on the north side of Ahtanum Creek (the northern boundary of the Yakima Indian Reservation), providing for use under certain conditions by the white settlers of up to 75 percent of the flow of the creek.

STATUTES INVOLVED

5 U.S.C. 485 provides:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * Indians. * * *

25 U.S.C. 2 provides:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and ~~agreeable~~ agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

STATEMENT

In July 1947, the United States filed this suit against respondents, a group of white settlers who were using the water of Ahtanum Creek, the northern boundary of the Yakima Indian Reservation, to establish the rights of the Indians to the waters of the creek under the doctrine of *Winters* v. *United States*, 207 U.S. 564. The primary defense asserted by respondents was a 1908 agreement between the United States on behalf of the Yakima Indians and the individual settlers, providing that the settlers could use up to 75 percent of the flow under certain conditions and limiting the Indians to 25 percent of the flow plus any additional water not needed or used by the settlers. The district court dismissed the action, but its judgment was reversed by the court of appeals, which held that the agreement was valid. The court of appeals remanded the case for findings by the district court as to the meaning of the agreement.

On remand, the district court held essentially that respondents were entitled to 75 percent of the flow of the creek and that the Indians were entitled to not more than 25 percent. The court of appeals reaffirmed the validity of the agreement but concluded that it was not intended to convey 75 percent of the waters' flow throughout the year irrespective of the settlers' use of the creek in 1908. The court held that the settlers obtained under the agreement no more water than they could prove had been put to beneficial use by their predecessors at the time of the

agreement and had been used continuously since that time. Since respondents had failed to show that they had, in 1908, used the creek's waters during the irrigating season beginning July 10, the court awarded to the Indians all the creek's water after July 10 each year.

REASONS FOR GRANTING THE WRIT

The purpose of this petition is to reserve, in case respondents' petition in *Ahtanum Irrigation District* v. *United States,* No. 1026, this Term, is granted, the question whether the Secretary of the Interior had the authority to bargain away in the 1908 agreement the rights of Yakima Tribe under its treaty with the United States. The court of appeals decided this issue adversely to the government in its initial opinion, but it recognized that it presented "a most difficult question." 236 F. 2d at 331. If respondents' petition is granted, that issue should not be foreclosed in this Court. Since the result of a holding that the Secretary lacked such authority would be the invalidation of the entire agreement, it would be necessary to vacate the court of appeals' judgment if the government's position on this issue were sustained. Accordingly, we respectfully submit that if the Court grants the petition for a writ of certiorari in *Ahtanum Irrigation District* v. *United States,* the present conditional cross-petition should also be

granted. If the former be denied, this petition should also be denied.

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APRIL 1965.

U.S. GOVERNMENT PRINTING OFFICE : 1965